

**Diamond Walnut Growers, Inc. and Cannery Workers, Processors, Warehousemen and Helpers, Local 601, International Brotherhood of Teamsters.** Cases 32–CA–13479 and 32–RC–3553

August 7, 1998

**SUPPLEMENTAL DECISION AND DIRECTION OF THIRD ELECTION**

BY CHAIRMAN GOULD AND MEMBERS FOX  
AND HURTGEN

The issue in this proceeding on remand from the United States Court of Appeals for the District of Columbia is whether the Board should set aside a 1993 representation election, which the Union lost.<sup>1</sup>

The facts of this case are more fully set forth in the Board's original decision and in the court decisions. In sum, the Respondent operates a walnut processing and distribution business in Stockton, California. For a number of years prior to 1991, the Union was the collective-bargaining representative of the Respondent's permanent and seasonal employees. In September of that year, the Union commenced an economic strike against the Respondent after negotiations failed to produce a bargaining agreement to succeed the one that expired 2 months earlier. The strike was accompanied by a Union-sponsored international boycott of the Respondent's product. The Respondent continued operations by hiring permanent replacements.

Over the course of 2 months in late 1992, the Board conducted a representation election among the Respondent's striking and replacement employees. Objections to that election, which the Union lost, resulted in the Board's direction of a second election. That election took place in October 1993. The Union, which again failed to gain a majority vote in its favor, filed objections leading to the present inquiry.

<sup>1</sup> On January 20, 1995, the National Labor Relations Board issued a Decision, Order and Direction of Third Election in this proceeding, 316 NLRB 36, finding that the Respondent's workplace assignment of three employees who returned to work after their participation in a strike violated Sec. 8(a)(3). The Respondent filed a petition for review of the Board's Order with the United States Court of Appeals for the District of Columbia Circuit, and the Board cross-petitioned for enforcement of its Order. On March 29, 1996, a divided panel of the court granted the Respondent's petition and denied the Board's cross-petition. 80 F.3d 485. Thereafter, the full court vacated the panel's decision and reheard the case en banc. On May 20, 1997, the court affirmed the Board's Order in part and denied enforcement in part. 113 F.3d 1259. The case was remanded to the Board for further proceeding.

By letter dated September 25, 1997, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position with respect to the issues raised by the court's opinion. The Respondent and the Union filed statements of position.

The Respondent has requested oral argument on the remanded issues. The request is denied as the record and the position statements adequately present the issues and the positions of the parties.

Shortly after the direction of second election, the Union requested the Respondent to reinstate several strikers to "immediate active employment," noting that it was "important that the replacement workers . . . hear from Union sympathizers." The Respondent assigned three of the strikers to work that differed from their prestrike job categories, even though there was seasonal work available in these categories. (It is undisputed that there were no year-round job vacancies in these categories.) The Board found that these job assignments were discriminatory and in violation of Section 8(a)(3). It also set aside the second election and directed a third one on the basis of the unlawful job assignments.<sup>2</sup>

In the D.C. Circuit's en banc decision, a court majority affirmed the Board's findings and enforced its Order only with respect to one striker, Alfonsina Munoz. The court remanded the case for the Board to determine whether there was still a basis for setting aside the election. Having accepted the court's remand, I view it as the law of the case. I further conclude that the Respondent's discriminatory job assignment for Munoz requires holding yet another election.

The Board's decision to set aside the second election was undertaken pursuant to the Board's traditional practice under *Dal-Tex Optical Co.*<sup>3</sup> of nullifying any representation election conducted amid contemporaneous unfair labor practices. The *Dal-Tex* rule is premised on the notion that unfair labor practices committed during the "critical period" prior to an election is "a fortiori conduct which interferes with the exercise of a free and untrammelled choice in an election." Id. Subsequently, the Board has recognized a narrow exception to the *Dal-Tex* rule, i.e., that some actions, although violations of Section 8(a)(1) of the Act, may be so minimal or isolated that it is "virtually impossible to conclude that they could have affected the results of the election."<sup>4</sup> This determination is based "on the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors."<sup>5</sup> The Respondent argues that this exception is equally applicable to 8(a)(3) violations, particularly where, as here, only one such violation was

<sup>2</sup> Although the Board severed Case 32–RC–3553 from Case 32–CA–13479 and remanded the former to Region 32 with direction to conduct a third election, no election was ever held.

<sup>3</sup> 137 NLRB 1782, 1786–1787 (1962).

<sup>4</sup> *Super Thrift Markets*, 233 NLRB 409 (1977). See also *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (election in unit of 800 not set aside by threats of loss of benefits, interrogations, and "momentary" interference with distribution of union literature where all incidents involved only 1 or 2 employees and a total of only 8 different employees, no evidence of dissemination, and election results not close) and *Caron International, Inc.*, 246 NLRB 1120 (1979) (election in unit of 850 not set aside by threat of discharge to 1 employee where no evidence of dissemination, employees worked at 5 different locations, and the employee received assurance from a management official that he could be discharged only for poor job performance).

<sup>5</sup> Ibid.

found to have occurred during the preelection period. Without deciding whether I would ever find an exception to the *Dal-Tex* rule in the circumstance of a preelection 8(a)(3) violation, I find no basis for making an exception here.

The Board's original decision below to set aside the second election was based on three reasons: (1) the serious nature of the Respondent's 8(a)(3) violations, "in which employees were denied jobs solely because of their protected strike activity, while at the same time being placed in positions that were among the lowest paying in the plant"; (2) the implicit broad dissemination of the discriminatory job placements to other unit employees, who were "particularly likely" to become aware of the disadvantaged situation of former strikers "sent back into the unit for the express purpose of communicating the Union's message to the unit employees"; and (3) the unfair labor practices' closeness in time to the election. 316 NLRB at 39.

In my view, the court's reduction in number of 8(a)(3) violations resulting from its decision does not make the aforementioned rationale inapplicable here. The single violation remains a serious one. The Respondent discriminatorily assigned returning striker Munoz to a low-paying job cracking and inspecting walnuts, rather than to a job in her prestrike position of forklift driver, because of concerns arising from her participation in the strike. Furthermore, although not expressly noted by the Board in its prior decision, the violation continued throughout the 2-week period preceding the election. It is reasonable to infer that such continuing discrimination would have a greater impact on unit employees than, for instance, an unlawful statement made in a momentary conversation.

I continue also to rely on the fact that the discriminatory job assignment was notorious, manifest to all employees in one of the Respondent's most populous departments. The union made unconditional offers to return to work on behalf of certain strikers, including Munoz, openly admitting to the Respondent that their return would allow the replacement employees an opportunity to hear from union sympathizers before the rerun election. The Employer subsequently sent a memo to all employees on September 21, 1993, informing them that a small group of strikers would be returning to work and that they "will be trying to convince employees to support the Union in the upcoming election." It is also undisputed that Munoz "freely roamed" the plant during her breaks to campaign for the Union. Under these circumstances, the relationship between Munoz' discriminatory job assignment and the election was obvious to all employees, since Munoz had returned to work for the express purpose of campaigning for the Union. Finally, as previously indicated, the discrimination occurred proximate to the election, increasing the likelihood that it had an impact on the employees' choice.

For the foregoing reasons, I find that this is not a case where it is "virtually impossible" to conclude that the discriminatory preelection job assignment given to Munoz could have adversely affected the election results. In accord with the general *Dal-Tex* rule, I shall set aside the second election and direct a third election.<sup>6</sup>

CHAIRMAN GOULD, concurring and dissenting in part.

For institutional reasons, I concur with Member Fox's view that the Respondent's violation of Section 8(a)(3) warrants setting aside the second election. I write separately, however, to emphasize my view that another, even more substantial basis exists for holding a third election. As I stated in the Board's previous decision,<sup>1</sup> I would sustain the Union's Objection 17 and find that the Regional Director's refusal to conduct the second election by mail ballot precluded the possibility of a fair election for eligible unit voters who were engaged in a protected strike against the Employer.

The second election took place on October 8 and 9, 1993, more than 2 years after the strike began. Prior to

<sup>6</sup> There were two union objections to the second election that a majority of the Board panel found unnecessary to pass on in light of its conclusion that the unfair labor practices were sufficient to set aside the election. See 316 NLRB at 39 fn. 15. One of those objections, Objection 5, alleged that certain individuals whom the Union claimed were statutory supervisors, interfered with the election by removing and defacing union campaign materials. This objection has now been resolved as a result of a separate challenge proceeding in which the individuals in question were found not to be statutory supervisors and thus eligible to vote in the election.

The other objection, Objection 17, alleged that the Regional Director interfered with the fair operation of the election process by failing to conduct the second election by mail ballot. I agree with Chairman Gould that the Regional Director erred in relying on Sec. 11336.1 of the Casehandling Manual in his decision recommending that Objection 17 be overruled. That provision, which pertains to mixed manual-mail elections, states, inter alia, that mail ballots should not be sent to employees who "are on leave of absence due to their own decision or condition." I agree that that provision clearly was not intended to apply to striking employees. I also agree that the use of mail ballots or a combination of mail and manual ballots is appropriate in circumstances where striking employees who are otherwise eligible to vote are likely to have difficulty participating in a manual election because they have left the area or are employed elsewhere.

Nevertheless, under the particular circumstances of this case, I do not find that the Regional Director's refusal to conduct the election by mail ballot constitutes an independent basis for setting aside the election. The Board traditionally has employed an abuse of discretion standard for determining whether to overturn the decision of a Regional Director involving the mechanics of an election. *National Van Lines*, 120 NLRB 1343, 1346 (1958). Accord: *Shepard Convention Services*, 314 NLRB 689, 690 (1994), enf. denied on other grounds 85 F.3d 671 (D.C. Cir. 1996). When the Regional Director informed the parties orally in October 1993, that the election would be conducted manually, the Union filed a special appeal to the Board in which it contended that the election should be conducted by mail. The Board denied the Union's special appeal, and the manual election was conducted on October 7 and 8, 1993. Given the Board's denial of the appeal, I am unable to find that it was an abuse of discretion for the Regional Director thereafter to proceed with a manual election.

<sup>1</sup> 316 NLRB 36, 39-40 fn. 15.

the election, the Union asked Board Region 32 officials to conduct a mail ballot election. Diamond Walnut opposed this request, and the Regional Director denied it.

In postelection proceedings, the Acting Regional Director overruled the Union's objection to the failure to conduct a mail ballot. He relied on the statement in Section 11336 of the Board's Casehandling Manual that "the use of mail balloting, at least in situations where any party is not agreeable to the use of mail ballots, should be limited to those circumstances that clearly indicate the infeasibility of a manual election." The Union had argued that many striking employees had either moved out of the Stockton, California area or were working elsewhere at different times at the time of the rerun election and, therefore, might not be able to participate in a manual election. The Acting Regional Director, however, expressed the view that striking employees are not entitled to special considerations, noting that Section 11336.1 of the Casehandling Manual states that mail ballots should not be used for employees who are absent "due to their own decision."

The Board utilizes an abuse of discretion standard for assessing the propriety of the Regional action challenged here. Under that standard, Regional Directors enjoy wide latitude in determining the method by which elections shall be conducted; but there are limits. Clearly, a Regional Director's refusal to conduct a mail ballot cannot stand if it is inconsistent with Board precedent and frustrates Congressional legislative intent. In my view, that is exactly what happened here. The rationale for denying a mail ballot election request here is inconsistent with current Board law pertaining to circumstances in which a mail ballot election can (and generally should) be held, even absent the agreement of all parties. More importantly, the failure to make a reasonable accommodation in the situation of replaced strikers who are eligible unit voters effectively nullified their right to vote mandated by Congress through the enactment of Section 9(c)(3) of the Act.

Initially, I note that the Acting Regional Director's sole source of authority for overruling the Union's objection is the Board's Casehandling Manual. The Board in *San Diego Gas and Electric*, 325 NLRB 1143 (1998), abandoned the "infeasibility" standard set forth in the Casehandling Manual and provided guidelines in keeping with the Board's decision. Under the holding of the Board in *San Diego Gas and Electric*, a mail ballot election is appropriate where eligible voters are scattered because of job duties over a wide geographic area; where eligible voters' work schedules vary such that they are not present at common locations and at common times; and where there is a strike, a lockout or picketing in progress. Since this is a strike situation a mail ballot is appropriate under the standards which have been adopted by the Board. In any case the provisions of this manual do not constitute "a form of authority binding . . . on the

Board." See Casehandling Manual, Purpose of Manual. See also *Shepard Convention Services*, 314 NLRB 689 (1994), enf. denied 85 F.3d 671 (D.C. Cir. 1996). A fortiori, these provisions cannot supersede or substitute for the provisions of the Act itself, for formal decisional precedent, or for the Board's Rules and Regulations.

In any event, the Acting Regional Director erred in his interpretation of the Manual's provisions. Essentially, he indicated that those provisions barred him from directing a mail ballot election over the Employer's objection unless a manual election was infeasible. The Manual itself encourages Regional Directors to explore the possibilities of a mail ballot election "particularly where long distances are involved, or where eligible voters are scattered because of their duties." In addition, the Board has never held or construed the Casehandling Manual so narrowly as to require them only in situations where it would be impossible to conduct a manual ballot election. See, e.g., *San Diego Gas & Electric*, supra (Chairman Gould concurring at p. 5-6); *Reynolds Wheels International*, 323 NLRB 1062 (1997); *London's Farm Dairy*, 323 NLRB 1057 (1997); *Oneida Country Community Action Agency*, 317 NLRB 852 (1995); *Shepard Convention Services*, 314 NLRB 689 (1994). Moreover, the General Counsel has recently reiterated the view which I expressed in *London's Farm Dairy*, supra at 2 fn. 3; *Willamette Industries*, 322 NLRB 856 (1997) (Chairman Gould, concurring at 856), where I emphasized the importance of "an unduly burdensome strain" on Agency resources as a factor to be taken into account by the Regional Director in ordering postal ballots.<sup>2</sup> This view is fortified by my concurring opinion in *San Diego Gas and Electric*, supra.

The Acting Regional Director also erred in relying on the provision in Section 11336.1 of the Manual. I do not agree that the situation of employees exercising their statutorily protected right to strike can be compared to that of employees who "are on a leave of absence due to their own decision or condition." That phrase obviously

<sup>2</sup> NLRB Office of the General Counsel Field Memorandum OM 98-7, issued January 30, 1998, where the General Counsel, referring to our precedent and authorities cited in my opinions, said the following:

As you know, the Fiscal Year 1998 budget appropriation to the National Labor Relations Board is inadequate to fully fund traditional Agency activities. The shortfall in budget resources is impacting on all Agency programs from employee benefits to infrastructure maintenance and development. As you also know, the conduct of representation elections by mail ballot obviates the need for a Board agent to travel to a site often far distant from his or her duty station to conduct manual balloting. Many elections may, therefore, be conducted at less expense to the Agency by the use of mail ballots. Cognizant of the need to conserve Agency budget resources wherever and whenever possible, in the exercise of their discretion to establish the mechanics of the election process, Regional Directors should closely consider directing the conduct of elections by mail ballots if doing so would save Agency funds, consistent with Casehandling Manual Sec. 11336 and the decisions of the Board, including those discussed above.

was meant to refer to employees who are currently working for the employer and who are away for reasons unrelated to their employment. It clearly was not intended to refer to striking employees.

Replaced economic strikers who are unable to participate in a manual, on-site election are entitled to special consideration in election situations. Section 9(c)(3) of the Act grants economic strikers the right to vote in representation elections conducted within 12 months from the inception of a strike. Congress amended the Act in 1959 to include this express eligibility provision

to eliminate the Taft-Hartley total prohibition against eligibility for replaced economic strikers in representation elections in order to prohibit unfair “union busting” practices by employers who under Taft-Hartley could precipitate a strike for the purpose of replacing strikers, call for an NLRB election in which the replacements vote against the union, and thus get rid of the union.<sup>3</sup>

Addressing this amendment, Senator Case of South Dakota commented:

I believe everyone would have to admit that if one loses his right to vote by engaging in a concerted stoppage of work, the right to strike has been effectively curtailed, crippled, and defeated.<sup>4</sup>

The Board has endeavored to give full expression in its representation elections to the stated purpose underlying Section 9(c)(3). *American Metal Products Co.*, 139 NLRB 601 (1962), waived the usual practice of declining to direct an election in the face of unresolved unfair labor practices in order to hold an election within the 12-month strike anniversary. *Kingsport Press, Inc.*, 146 NLRB 260 (1964), established an expedited procedure for circumstances in which the 12-month striker eligibility period might expire under normal casehandling procedures. *Jeld-Wen of Everett*, supra, held that the 12-month eligibility period for a first election would be applied to preserve the original eligibility of replaced economic strikers in any subsequent rerun election. 285 NLRB at 121. In fact, this holding will apply to the direction of a third election here.

Any consideration of the mail ballot option for an election involving eligible replaced economic strikers must likewise comply with the Congressional mandate to avoid their disenfranchisement. It must also contemplate the realities of a replaced striker’s situation. Once replaced, most strikers will more likely than not have to take other jobs in order to make ends meet. (After all, they have no immediate right to return to work even if the strike ends.) Some of them will necessarily move out

of the immediate area of their former workplace. Neither act represents an abandonment of interest in returning to their prestrike jobs. This dispersed replaced striker population faces obvious practical difficulties (work schedules, transportation, finances, etc.) if required to return to the struck workplace to vote in an election that is critical to the ultimate success of their protected work stoppage. Under these circumstances, a regional director frustrates the purpose of 9(c)(3), and renders null its assurance of replaced strikers’ eligibility, by failing to direct a mail ballot election.

My position here accords with the Board’s actions not only in *San Diego Gas & Electric*, supra, but also in *Lone Star Northwest, Inc.*, 36-RD-1434 (1994) (unpublished). There the Acting Regional Director had directed a manual ballot election rejecting a mixed manual-mail ballot election for the eligible economic strikers (mail) and their replacements (manual). The Board granted review. Following the grant of review and the employer’s action agreeing to stipulate to a mixed mail-manual election the Board directed a mixed manual-mail ballot election.

In that case, the Regional Director’s Direction of Election of which we granted review best demonstrates the consequences of the plurality’s decision today when he said:

Strikers who are temporarily employed elsewhere are so employed due to their own decision.

In a democratic society—particularly one which protects the right to strike, and to vote while striking, under the National Labor Relations Act—we both mock and give the lie to the policies of our statute and our Nation when we disenfranchise workers who undertake the “decision” to withhold their labor because of a dispute with their employer and find work elsewhere. That is not the system for which Congress opted in 1959 when it voted to enfranchise economic strikers. Yet that is the system which the plurality votes for today.

I would adhere to the Landrum-Griffin amendments of 1959 which establish some of the parameters for our Agency. I would reverse the Regional Director’s decision rendered, as it was, prior to extant precedent such as *San Diego Gas & Electric*, supra; *London’s Farm Dairy, Inc.*, supra; *Reynolds Wheels International*, supra; *Willamette Industries*, supra; and *Shepard Convention Services*, supra. I would thus honor the statutory policies which, consistent with the values of our democratic system of government in the United States, promote enfranchisement for all employees. I, therefore, dissent.<sup>5</sup>

Accordingly, for all the reasons set forth above, I would reverse the Regional Director’s decision not to

<sup>3</sup> *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 119 (1987).

<sup>4</sup> Cong. Rec. Apr. 21, 1959, at 5732, 2 Leg. Hist. at 1065(1).

<sup>5</sup> Member Hurtgen notes that the second election had a participation rate of 88.9 percent. As I stated in the previous decision at fn. 15, the relevant point here is that more than 100 employees failed to vote, a number which is sufficient to affect the outcome of the election.

provide for a mail ballot here. It constitutes an abuse of administrative discretion. I dissent.

MEMBER HURTGEN, dissenting in part.

I do not agree that the single unfair labor practice in this case warrants the overturning of an election.

My colleagues apply an essentially per se rule that unfair labor practices committed during the critical period will result in the overturning of an election.<sup>1</sup>

I would not apply any per se rules or virtually per se rules. In my view, each case must be evaluated on its own facts to determine whether, in all of the circumstances, the conduct was such as to preclude a fair election. In the instant case, there was a single unfair labor practice directed toward a single employee, in a unit of 1300 employees. Further, the unfair labor practice was a wrongful assignment, not a termination. There is no showing that the assignment prevented the employee from communicating with her fellow employees at the workplace or elsewhere. Indeed, as my colleagues concede, the employee “freely roamed” the plant during her breaks to campaign for the Union.

My colleagues also say that there was “implicit broad dissemination” of the assignment, and that it was “par-

ticularly likely” that word of the assignment would spread. The very language of these quoted phrases is a testament to the obvious—there is no hard evidence to support the assertion.

As to Objection 17, for the reasons set forth in my dissent in *San Diego Gas & Electric*, 325 NLRB 1143 (1998), I would not set aside the election based on its manual (rather than by mail) character.

I do not agree that a mail ballot is essential to the ability of the strikers to vote. Both previous elections were held during the strike, and both were manual. In the first one, 1190 employees voted (including challenges), a participation rate of 91.5 percent. In the second election, 1140 employees voted (including challenges), a participation rate of 88.9 percent. In addition, there is no showing that the nonvoting employees consisted disproportionately of striking employees. Thus, based on actual experience in this unit, there is no basis for saying that a mail ballot is essential for striker participation in the election.

More fundamentally, however, in the instant case, this issue was resolved by the Board before the election. Thus, the Regional Director denied the Petitioner’s request for a mail ballot, the Petitioner appealed, and the Board denied that appeal.

[Direction of Third Election omitted from publication.]

<sup>1</sup> Their one exception is a situation where it is “virtually impossible to conclude that [the unfair labor practices] affected the results of the election.”